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11 **UNITED STATES BANKRUPTCY COURT**

12 **DISTRICT OF NEVADA**

13 IN RE:

Case No.: 13-50461-BTB

14 CHRISTOPHER MICHAEL MARINO, and  
15 VALERIE MARGARET MARINO,

Chapter 7

16 Debtors

17 **REPLY TO OPPOSITION TO MOTION  
18 TO CONTINUE EVIDENTIARY  
19 HEARING UNTIL AFTER RULING ON  
20 MOTION FOR RELIEF FROM  
21 JUDGMENT**

Hearing Date: January 19, 2021

Hearing Time: 2:00 p.m.

22 PHH Mortgage Corporation, formerly known as Ocwen Loan Servicing, LLC ("PHH"),  
23 hereby replies to Debtor's Opposition to Motion to Continue Evidentiary Hearing until after  
24 Ruling on Motion for Relief from Judgment.

25 **I. LEGAL ARGUMENT**

26 Debtors' Opposition raises three main arguments against granting the continuance, none  
27 of which warrant denying PHH's Motion:

28 **1. Safety:**

First the Opposition claims that safety of the parties is a non-issue because the hearing can be held remotely by Zoom. Although the Court has the ability to hold hearings remotely, the question is whether a remote hearing is appropriate here in light of the circumstances. Under the

Supreme Court's decision in *Taggart v. Lorenzen*, 587 U.S. \_\_\_, 139 S. Ct. 1795, 1802 (2019), even if this Court finds that there was a contempt under the objective, "no fair ground of doubt" standard, this Court is still supposed to consider PHH's *subjective* intent in evaluating the appropriate penalty to impose for the contempt (keeping in mind the Supreme Court's prior determinations that: "only the least possible power adequate to the end proposed should be used in contempt cases.")<sup>1</sup> The best way to evaluate that subjective factor is through the in-person testimony of the PHH witness.

These factors all make a live, in-person hearing preferable and more fair and just. With the COVID vaccine rollout in effect, it is very likely a safe in-person hearing can be conducted in the Spring of this year. The delay requested is minimal—no more than 90 days, which is a fraction of the time this case has been in litigation. And, the Opposition fails to identify any actual prejudice to Debtors from the continuance. In this regard, it bears repeating that Debtors still have a writ of certiorari pending with the United States Supreme Court on the issue of the denial of attorney's fees by the BAP, and the response to that petition is not even due until January 26, 2021. It seems disingenuous for Debtors to try to rush resolution of the underlying contempt proceedings when they have prolonged proceedings at the higher court level.

## **2. Judicial Economy:**

Debtors next dispute that judicial efficiency and economy is served by the continuance, primarily based on the length of time this case has already been open. However, the issue of judicial efficiency and economy looks forward, not back. The question presented is just whether, in light of the two separate proceedings before this Court (the Motion to Vacate the existing contempt order and the Motion for Punitive Damages based on the existing contempt order) it makes more sense to resolve the Motion to Vacate before the Court and the parties expend resources on deciding what punitive damages, if any, to impose here.

Obviously, if the Motion to Vacate is granted, it moots or at least defers the hearing on the punitive damages motion pending the results of a further evidentiary hearing applying the

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<sup>1</sup> *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 801, 107 S.Ct. 2124 (1987).

proper standard of review as directed by the Supreme Court in *Taggart*, *supra*, to determine if there really was a contempt and, if so, as to what communications. Only after the existence and parameters of the contempt are established can this Court decide whether punitive damages are appropriate and, if so, in what amount. The continuance request is thus not being made simply as a matter of timing but more as a matter of enabling the Court and the parties to complete the evidentiary hearing in a more efficient and economical matter. Until the Rule 60 Motion is decided, the parties do not know whether they need to prepare and provide witnesses and exhibits to reexamine the original finding of contempt, nor even what preparations are needed for the evidentiary hearing as to the punitive damages phase. PHH needs to know what evidence will be allowed, especially if the Debtors are disputing PHH's ability to present that evidence; while Debtors would need to marshal their own evidence to attempt to retain the windfall recovery they obtained from the original order.

Debtors' attempt to characterize the evidentiary hearing as nothing more than a "rubber stamp" of the prior contempt ruling, but this characterization is clearly false and underscores why this litigation has been so prolonged. From the beginning, Debtors have sought a quick and easy victory rather than a full adjudication on the merits of the case based on all available facts. As the Ninth Circuit stated in its decision on remand from the Supreme Court in *Taggart*: "We are now tasked with revisiting this case and applying this new standard."<sup>2</sup> Similarly, this Court is not supposed to just rubber-stamp its original order but instead must perform its own analysis under the new *Taggart* standard in order to reach a proper ruling on the Debtors' underlying Motion for Sanctions.

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<sup>2</sup> 980 F.3d 1340, 1347 (9th Cir. 2020). Applying the new standard, the Ninth Circuit held that: "The question for us, however, is not whether *Taggart* actually "returned to the fray" in the Oregon state court litigation. Nor is it whether the Creditors had an objectively reasonable basis for concluding that *Taggart* had "returned to the fray." Rather, the question is whether the Creditors had some—indeed, *any*—objectively reasonable basis for concluding that *Taggart* *might have* "returned to the fray" and that their motion for post-petition attorney's fees *might have* been lawful." [emphases in original]

1 In this regard, contrary to Debtors' implication in their Opposition, the Ninth Circuit did  
 2 not affirm this Court's or the BAP's ruling. It merely stated it lacked jurisdiction until the  
 3 remanded punitive damages issue was resolved, dismissing the appeal as premature pending a  
 4 final judgment. In doing so, the Ninth Circuit specifically stated that: "In short, the BAP  
 5 remanded to the bankruptcy court *for more factual findings* on punitive damages. The  
 6 bankruptcy court's decision whether punitive damages are appropriate is not a 'ministerial  
 7 task[.]'"<sup>3</sup> In other words, not just a "rubber stamp."

8 **3. This Court Has Not Yet Applied The *Taggart* Standard to PHH's Conduct:**

9 Finally, Debtors' misleadingly argue that *Taggart* lowered the prior Ninth Circuit's  
 10 standard so there is no need for a new hearing. While it is certainly true that *Taggart* rejected the  
 11 Ninth Circuit's subjective standard for determining whether a contempt had occurred (retaining it  
 12 only as a factor to determine the amount of damages), Debtors' argument presumes that this  
 13 Court applied the subjective standard in making its original ruling. It did not. Instead, this Court  
 14 appears to have essentially applied a strict liability standard—one that *Taggart* expressly  
 15 rejected.<sup>4</sup> The Supreme Court did not just decide a legal issue: it decided *the* legal issue for how  
 16 to treat discharge violations. As such, there is more at stake here than just proceeding straight to  
 17 an evidentiary hearing. The Court will first have to apply the correct standard (the objective one  
 18 of "no fair grounds") to determine whether and to what extent a discharge violation occurred  
 19 here; then apply a subjective test to assess the appropriate damages; and finally, determine the  
 20 extent to which punitive damages might be appropriate (again, keeping in mind the requirement  
 21 under *Young, supra*, that "only the least possible power adequate to the end proposed should be  
 22 used in contempt cases").

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 28 <sup>3</sup> *In re Marino*, 949 F.3d 483, 488 (9th Cir. 2020)(internal citations *omitted*)[emphasis added].

<sup>4</sup> 139 S.Ct. at 1803-04.

1 **II. CONCLUSION**

2 For the reasons set forth above, PHH respectfully requests that this Court take nothing  
3 from Debtor's Opposition and grant PHH's request for a 90-day continuance of the evidentiary  
4 hearing.

5 Respectfully submitted

6 Dated: January 12, 2021

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**CERTIFICATE OF SERVICE**

1. On January 12, 2020, I served the following document(s):

**REPLY TO OPPOSITION TO MOTION TO CONTINUE EVIDENTIARY  
HEARING UNTIL AFTER RULING ON MOTION FOR RELIEF FROM  
JUDGMENT**

2. I served the above-named document(s) by the following means to the persons as listed below:

(Check all that apply)

- a. ECF System (You must attach the "Notice of Electronic Filing", or list all persons and address and attach additional paper if necessary)

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TRUST

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- ☒ b. United States mail, postage fully pre-paid (List persons and addresses. Attach additional paper if necessary)

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- ☐ c. Personal Service (List persons and addresses. Attach additional paper if necessary)

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Signed on Tuesday, January 12, 2021.

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